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Constitutional Law -- Executive Privilege: Tilting the Scales in Favor of Secrecy

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Although the Supreme Court will have to retreat somewhat from the absolute wording of *Mullane* to uphold the constitutionality of a rule that does not require individual notice in all cases to known persons, rule 23 should, nevertheless, be amended,[51] and the Court should uphold it.[52] Cases such as *Eisen*, although decided correctly under the present rule, demonstrate the need for a device that will help to create "a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."[53]

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Constitutional Law—Executive Privilege: Tilting the Scales in Favor of Secrecy

Executive privilege is a concept invoked by members of the executive branch of the government to justify withholding evidence and other communicative materials from the legislative and judicial branches.[1] Since 1792[2] debate surrounding the doctrine has been pre-

51. The amended rule should make no distinction between subdivision (b)(3) and subdivisions (b)(1) and (b)(2) with regard to the notice requirement. It would still be appropriate, however, to require the court to find that the class action is the best available means for handling the controversy. *See* note 52 *infra*. The court will also have discretion under subsection (d) to direct that notice be provided to the class members when the court feels it is necessary.

52. Not everyone agrees that the class action is the best method for dealing with antitrust and securities actions involving a very large number of potential claimants. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1019-20 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974); Kaplan, *supra* note 42, at 394; H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118-20 (1973). Although arguments against such use of the class action may have merit, they should not be determinative of the notice required by due process once the court has determined that no better method exists for handling the controversy, as it must under subdivision (b)(3). One factor in the determination may be the possible necessity for future notice to the class members for the purpose of filing proofs of loss after the defendant is found liable. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 567 (2d Cir. 1968). This possibility alone, however, should not preclude use of the class action. Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 726 (1967). In fact, in such a situation it may be possible to require the defendant to finance the notice. Comment, 29 MD. L. REV., *supra* note 30, at 157.

53. Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140, 2157 (1974) (Douglas, J., dissenting).

1. *Cf.* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

2. In refusing to turn over documents requested by Congress in its inquiry into a disastrous military expedition against a tribe of Indians, President Washington con-

dominated by three questions. First, is executive privilege constitutionally based? Secondly, who is the final judge of the validity of any assertion of the privilege? Thirdly, assuming that the judiciary has the power to review such assertions, what is the scope of the privilege, and what guidelines will be used to determine whether, in a given case, the assertion of the privilege is warranted?[3] In *United States v. Nixon*[4] a unanimous[5] Supreme Court gave its first definitive answers to these questions. The Court held that, while the privilege is rooted in the Constitution, the courts, and not the Executive, must be the final arbiters of the scope and the validity of any claim of executive privilege.

The case arose out of an unusual chain of events. On March 1, 1974, a federal grand jury investigating the case of *United States v. Mitchell*[6] indicted seven individuals[7] for conspiracy to obstruct justice and to defraud the United States. Thereafter, the Special Prosecutor[8] was granted a third-party subpoena duces tecum, pursuant to Federal Rules of Criminal Procedure 17(c), requiring the pre-trial production of certain tape recordings and documents that were in the President's possession. In response, counsel for the President filed a motion to quash the subpoena, accompanied by a formal claim of privilege. The District Court for the District of Columbia denied the motion to quash

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tended that "the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." STAFF OF SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., MEMOS OF THE ATTORNEY GENERAL ON THE POWER OF THE PRESIDENT TO WITHHOLD INFORMATION FROM THE CONGRESS 5 (1958). The presidential use of executive privilege has become more and more widespread in the twentieth century. President Eisenhower's letter to Secretary of Defense Charles Wilson, directing both the Secretary and his subordinates to refrain from testifying about executive discussions on the Army-McCarthy dispute, provided substantial precedential authority for the withholding of information in quasi-judicial proceedings. This trend toward secrecy was accelerated by the Nixon administration. *See* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 252-64 (1974); F. ROURKE, SECRECY AND PUBLICITY 65-74 (1961); W. TAFT, THE PRESIDENT AND HIS POWERS 129 (1916).

3. A fourth question, whether decisions adverse to the President can be enforced, and how, has also been posed during the debate. The question will not be definitively answered until circumstances precipitate a constitutional crisis of greater magnitude than any yet seen.

4. 94 S. Ct. 3090 (1974).

5. Mr. Justice Rehnquist took no part in the consideration or decision of the case.

6. Criminal No. 74-110 (D.D.C., filed Mar. 1, 1974).

7. The defendants were John N. Mitchell, H.R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson, and Gordon Strachan. All of the defendants were either members of the White House staff or occupied a position of responsibility in the 1972 Committee for the Re-Election of the President. 94 S. Ct. at 3097 n.3.

8. The Attorney General delegated the authority to represent the United States in matters arising out of the investigation of the "Watergate affair" to a Special Prosecutor. 38 Fed. Reg. 30739, *as amended*, 38 Fed. Reg. 32805 (1973).

and ordered the prompt production of the subpoenaed items. The President gave notice of appeal, and subsequently, the Special Prosecutor filed in the Supreme Court a petition for writ of certiorari before judgment.[9] Because of the unique setting in which the dispute arose, the Court granted the petition,[10] bringing before it the important questions presented by the President's assertion of executive privilege.

After dispensing with several important preliminary questions,[11] Chief Justice Burger examined the two arguments made by the President's counsel in support of a constitutionally based executive privilege. First, the President contended that the constitutional doctrine of the separation of powers guaranteed the absolute independence of the Executive in the fulfillment of his Article II duties and that this "independence . . . insulates a president from judicial subpoena."[12] Secondly, the President argued that the powers expressly delegated to the Executive by the Constitution carry with them certain inherent powers and privileges that are necessary to their efficient performance. Acknowledging the validity of these arguments, Chief Justice Burger recognized a privilege in favor of the Executive resting on "constitutional underpinnings."[13] The Court reasoned that occasions may arise in which the Executive could obtain candid advice from his advisers only by insuring them that their comments would not be made public.[14] The privilege granted to the President was necessary, therefore, to insure efficiency in the executive decisionmaking process.

The Court next considered the President's contention that the privilege was unreviewable.[15] The Chief Justice first examined the judiciary's role in the tripartite federal government. Admitting that each branch must individually interpret the Constitution in the pursuance of its constitutional duties, he nonetheless reiterated that "it is 'emphatically the province and the duty' of this Court 'to say what the

9. 28 U.S.C. §§ 1254(1), 2101(e) (1970); 94 S. Ct. at 3098-100 & n.1. Because the district court's order was "final" and therefore appealable and because of the special circumstances in the case, the Court felt that the petition for writ of certiorari before judgment was appropriate in *Nixon*. *Id.* at 3099.

10. 94 S. Ct. at 3098.

11. The Court considered claims that it lacked subject-matter jurisdiction, that the dispute was not justiciable and that the Special Prosecutor had failed to comply with the requirements of FED. R. CRIM. P. 17(c). 94 S. Ct. at 3098-105. The Court's treatment of these issues is noteworthy itself. *See* note 44 *infra*.

12. 94 S. Ct. at 3106.

13. *Id.*

14. *Id.*

15. *Id.*

law is' . . . "[16] Therefore, all such constitutional interpretations, regardless of the branch making them, are subject to Supreme Court review.[17] This power to determine whether an action by another branch exceeds its constitutional mandate is based upon the separation of powers doctrine, which delegates to the Court its role as the ultimate interpreter of the Constitution.[18] The Chief Justice reasoned that since such judicial review encompasses the powers expressly delegated by the Constitution, it must likewise extend "to powers alleged to *derive* from enumerated powers."[19] Thus, the Court has the authority to review claims of privilege whether based upon the express or the implied powers of the President.

After concluding that the judiciary is the final arbiter of the validity of any claim of executive privilege, the Court formulated a test for determining the merits of such claims. Chief Justice Burger first discussed the judiciary's constitutional mandate to conduct trials in accordance with due process, which, he suggested, is in direct conflict with the exercise of the President's privilege. As seen by the Chief Justice, the primary responsibility of the courts is to facilitate the "search for truth." This duty is fulfilled through "full disclosure of all the facts, within the framework of the rules of evidence."[20] Privileges to withhold evidence are "not lightly created nor expansively construed, for they are in derogation of the search for truth."[21] Because of this concern, only the most exigent circumstances justify the compromise of these judicial principles. Therefore, since "the legitimate needs of the judicial process"[22] may outweigh the President's privilege in some situations, the Court adopted a balancing test to weigh these competing interests.

In order, however, to protect the need for security in the executive decisionmaking process,[23] the Court felt compelled to show deference to the President in formulating the balancing test. Chief Justice Burger therefore termed the privilege "presumptive":[24] when the President asserts the privilege, the party seeking production has the burden of going forward with sufficient evidence to rebut the presumption.

16. *Id., quoting* Marbury v. Madison, 1 U.S. (1 Cranch) 137, 177 (1803).
17. 94 S. Ct. at 3106-07.
18. Marbury v. Madison, 1 U.S. (1 Cranch) 137 (1803).
19. 94 S. Ct. at 3105 (emphasis added).
20. *Id.* at 3108.
21. *Id.; see id.* at 3108 n.18.
22. *Id.* at 3107.
23. *See* text accompanying note 14 *supra.*
24. 94 S. Ct. at 3107-08.

Applying this test to the facts in *Nixon*, the Chief Justice ruled that the claim of privilege could not prevail. The specific need for obtaining relevant evidence in a pending *criminal* proceeding and the sixth amendment guarantees of fair trial and compulsory process outweighed the President's claim of privilege. The Court noted, however, that the claim of privilege in this case was general—based solely on the need to insure effective decisionmaking. The Court further noted that the President's claim made no reference to military or diplomatic matters. Indeed, the Court intimated that, had these elements been present, the result may have been different.[25] Likewise, the Chief Justice expressly refused to consider whether a *civil* litigant's rights could outweigh even a generalized claim of privilege like that asserted in *Nixon*.[26]

The Court's ruling is the foreseeable result of over 150 years of litigation involving executive privilege. Arguments presented in favor of the privilege have been rooted in the common law,[27] in the concept of the separation of powers[28] and in the nature of the executive branch itself. Regardless of its basis, the privilege has continually been recognized as a valid exception to the general rules of evidence.[29]

In 1807 in *United States v. Burr*[30] Mr. Chief Justice Marshall, sitting as a trial judge, ruled that President Jefferson must deliver confidential correspondences to the court for use by the defendant in a

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25. *Id.* at 3108-09.

26. *Id.* at 3108-09 n.19.

27. *See* United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); F. ROURKE, *supra* note 2, at 63; Berger, *The President, Congress and the Courts*, 83 YALE L.J. 1111 (1974); Annot., 95 L. Ed. 425 (1950); *cf.* United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951). The common law basis of executive privilege is doubtful. In the year that the Constitution was adopted by the United States, a British court stated that "it is to be observed, that the crown can no more withhold evidence of documents in its possession, than a private person. If the court thinks proper to order the production of any public instrument, that order must be obeyed." The Ship Columbus, 1 Collectanea Juridica 88, 92 (Adm. 1789). Not until fifty-three years later did the British courts recognize a privilege for "candid exchange" at high levels. Smith v. East India Co., 41 Eng. Rep. 550 (Ch. 1841). After sweeping extension in Duncan v. Cammell, Laird & Co., [1942] A.C. 624 (making the privilege conclusive), the House of Lords repudiated the privilege in Conway v. Rimmer, [1968] A.C. 910.

28. *See* United States v. Nixon, 94 S. Ct. 3090 (1974). *But see* Nixon v. Sirica, 487 F.2d 700, 715 (D.C. Cir. 1973) (per curiam), in which the court reasoned that the recognition of the type of privilege urged in *Nixon* would amount to a *breach* of the separation of powers.

29. *E.g.*, Totten v. United States, 92 U.S. 105 (1875); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (1971) (per curiam); United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C. D. Va. 1807).

30. 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

pending criminal trial. In the course of his opinion, the Chief Justice acknowledged, in dictum, an exception in favor of the Executive to the general rule that "the public . . . has a right to every man's evidence."[31] The court did not, however, specifically acknowledge the basis of the privilege, define its scope, or establish a method for determining its validity in a given case. It held merely that there were situations in which certain documents in the President's possession should not be opened to the public view. Because Chief Justice Marshall stated that the privilege resulted from the President's position of public responsibility,[32] he arguably based the privilege on the inherent powers of the President.

Subsequent decisions indicated a trend toward executive absolutism, at least in the area of military secrets.[33] Such decisions intimated that the judiciary would be precluded from even considering claims of executive privilege. These decisions did not determine the scope and the validity of assertions of executive privilege, holding only that military and diplomatic secrecy required judicial protection. A line of cases in the lower federal courts, however, uniformly held that the power to determine the scope of executive privilege and to determine the validity of refusals to disclose communications rested solely in the judiciary as a result of the separation of powers doctrine.[34]

In *United States v. Reynolds*[35] the Supreme Court agreed with these lower courts. Passing on a claim of privilege asserted by the government in a suit under the Tort Claims Act, the Court stated that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege. . . . Judicial control over the evidence in a case cannot be abdicated to the caprice of executive offi-

31. Branzburg v. Hayes, 408 U.S. 665, 688 (1972); United States v. Bryan, 339 U.S. 323, 331 (1950); *cf.* Watkins v. United States, 354 U.S. 178, 187 (1957).

32. 25 F. Cas. at 192.

33. *E.g.*, United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900); Totten v. United States, 92 U.S. 105 (1875); Dayton v. Dulles, 254 F.2d 71, 77 (D.C. Cir. 1957); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912). *But see* United States v. Reynolds, 345 U.S. 1 (1953); Halpern v. United States, 258 F.2d 36, 44 (2d Cir. 1958); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949) (which all strongly suggest that even this privilege is not absolute).

34. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953); United States v. Schine Chain Theatres, 4 F.R.D. 108 (W.D.N.Y. 1964); O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947); Bank Line v. United States, 68 F. Supp. 587 (S.D.N.Y. 1946); Walling v. Richmond Screw Anchor Co., 4 F.R.D. 265 (E.D.N.Y. 1943).

35. 345 U.S. 1 (1953).

cers."[36] This ruling has been followed by courts subsequently faced with claims of privilege.[37]

Although these cases seemingly established the supremacy of the judiciary in deciding such disputes, they did not elucidate a method for determining the validity of specific claims of executive privilege. A test later evolved in the lower courts, however, under which the moving party's need for the documents was balanced against the reasons asserted by the government in defending their confidentiality.[38] This adjustment of competing interests has been used most notably in cases involving generalized claims of privilege based solely upon the sanctity of the executive decisionmaking process.[39] In *Nixon v. Sirica*[40] the standard was further refined by the recognition of a "presumptive privilege" in favor of the President, showing deference to the Executive in striking the balance.[41]

The balancing test that developed in the lower federal courts was adopted in its entirety by the Supreme Court in *Nixon*. This test is deceptively simple. When the President determines that evidentiary materials sought by legal process should not be disclosed, he will assert the privilege. This assertion is presumed to be valid and thus shifts the burden of going forward to the party seeking production. The moving party must then rebut the presumption. Once this has occurred, the relative merits of both parties are weighed and the court decides whether production is warranted.

The strengths of this test are readily apparent. Primarily, the

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36. *Id.* at 8-10.

37. Sperandeo v. Milk Drivers Local 537, 334 F.2d 381, 384 (10th Cir. 1964); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960); Overby v. United States Fidelity & Guar. Co., 224 F.2d 158, 163 (5th Cir. 1955); Timken Roller Bearing Co. v. United States, 38 F.R.D. 57, 63 (N.D. Ohio 1964); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958). *See also* Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D. Ill. 1965).

38. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971) (per curiam); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

39. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) (per curiam); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

40. 487 F.2d 700 (D.C. Cir. 1973) (per curiam). In this case the court was presented with arguments similar to those in *United States v. Nixon*. Here, the President sought to withhold tape recordings from the grand jury, rather than from the prosecution or defense.

41. *Id.* at 717.

flexibility inherent in balancing tests is well suited for insuring the maximum sanctity of conflicting interests—here, the independence of both the executive and judicial branches, as well as the basic principles underlying each.[42] These interests are weighed on a case by case basis. Obviously, this approach is more desirable than the wholesale compromise of principles which would result from the recognition of an absolute privilege on the one hand or the denial of a privilege as a matter of law on the other.[43] An additional strength of the *Nixon* test is the presumption of validity afforded the President's assertion. This presumption conforms the test to the separation of powers doctrine by showing deference to the executive branch.

These strengths, however, may, in future applications, be outweighed by weaknesses in the test. The burden placed upon the party seeking evidence is somewhat inequitable. It requires that party to justify access to facts essential to his case, contrary to the accepted methods of the Anglo-American legal system.[44] Furthermore, the prestige of the parties involved and the questions pertaining to national security that may arise in cases like *Nixon* may make it difficult for lower federal and state court judges to render competent decisions.

Foremost among these weaknesses are problems in the mechanics of the balancing test. Before a court is called upon to apply the *Nixon* test, the party seeking production must comply with the pertinent evidentiary requirements for obtaining a subpoena, such as showing relevance and materiality. If the privilege is then asserted to prevent disclosure, what further can be shown to overcome the President's presumption? Cases applying the standards of Rule 17(c),[45] the rule

42. *See* text accompanying notes 12-15, 21-24 *supra.*

43. For the same reasons, a test similar to the one adopted in *Nixon* could be utilized to evaluate "novel" privileges. For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court seems to have applied a balancing test of sorts in weighing the merits of the "journalist's privilege" to withhold the identity of his sources. In that case, the Court held, again, that the demands of the criminal justice system compelled disclosure. However, the first amendment guarantee of free press is also a fundamental right, and deserves, at least, the protection of a case by case weighing, if not a presumptive privilege in favor of the reporter, rather than a summary denial of judicial protection.

44. *See* cases cited note 31 *supra.*

45. The leading case interpreting these standards is Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), which recognized that the subpoena duces tecum was not intended to provide a method for discovery in criminal cases, but was merely a means to expedite trials by establishing a time and place prior to trial for the inspection of materials obtained through compliance with the standards of the Federal Rules of Criminal Procedure. *Id.* at 220. These standards were concisely stated by Judge Winfield in United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). In order to procure pretrial production, the moving party must show that the documents are both evi-

applicable in *Nixon*, indicate that this initial showing practically exhausts the knowledge of the party seeking production. Indeed, not much more than a general showing of relevance, admissibility and specificity is possible in cases in which the documents sought are of a secret nature.

One must assume, however, that something more is required to rebut the presumption afforded the President than a reiteration of the facts justifying the issuance of a subpoena. To conclude otherwise would render the presumption meaningless—a mere form, serving no purpose other than to frustrate the party seeking production and to prolong the court's inquiry. Apparently, the litigant must assert the basic principles underlying his action itself as a part of this further showing.[46] These rudimentary principles include, for example, any constitutional rights of the litigants as well as any strong public policy reflected in his suit. In addition, any facts that make the moving party's need critical to the maintenance of his action or that distinguish his case from others of a similar nature should be asserted.[47]

In those cases in which the underlying principles and special facts presented are adjudged to rebut the presumption, something further must be shown by the Executive to justify nondisclosure. Is the President now required to disclose the specific interests and conversations that should be guarded?[48] It may seem initially that disclosure of such information to the courts would deprive the balancing test of its substance, since the same result could be reached through initial *in camera* inspection without the delay occasioned by the *Nixon* test. The process

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dentiary and relevant, that they are not accessible by other means available to the party seeking them, and that the materials are essential to the preparation of the case to be presented. In addition, the application for the subpoena must be made in good faith and not merely as a "fishing expedition."

46. In *Nixon* the principles underlying all *criminal* proceedings—the constitutional rights of defendants to a fair trial and compulsory process, the need for efficiency and justice in the system of criminal law, and the nation's committment to the rule of law—when coupled with the special facts presented, note 47 *infra*, were adjudged to outweigh the presumption. 94 S. Ct. 3106-08.

47. In *Nixon* these circumstances included the fact that the alleged injustices were perpetrated in the offices of the White House. Moreover, the President had been declared an unindicted co-conspirator by the grand jury investigating the Watergate scandal. Brief for the Petitioner at 11-12.

48. This problem could also lead to litigation because the assertion of the general privilege afforded in *Nixon* may constitute a waiver of other privileges recognized by the courts, *i.e.* those resting on the need to protect military and diplomatic secrets. It is suggested that this *should* be the case, since the assertion of the general privilege in the face of such secrets would be little more than a frustration of the legal process and a stalling tactic, if in fact privileges do exist for the specific purpose of protecting the national security.

outlined in *Nixon*, however, affords the maximum protection for executive conversations by precluding disclosure, even to the courts, except in those special cases in which the need for the documents outweighs the presumption.

Furthermore, it has been argued that even *in camera* inspection of the conversations would negate the beneficial results of the privilege.[49] There is, however, "no danger to the public interest in submitting the question of privilege to the decision of the courts. The judges . . . are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments."[50] When the presumption of judicial integrity is also considered, there is sufficient protection afforded the executive in those comparatively few cases in which the court is called upon to balance the important competing interests presented.

Having reached the point in the test at which the needs of the executive are to be weighed against the countervailing public and private rights presented by the party seeking production, the court is faced with a serious dilemma. Confronted with an array of conflicting principles and factual arguments, the courts will undoubtedly examine prior cases to determine which facts have been crucial in decisions concerning the exercise of executive privilege. These cases indicate that the following facts carry considerable weight: whether the materials sought are of primary importance to the case presented;[51] the volume and diversity of prior production by the party asserting the privilege;[52] the presence of available alternatives for obtaining the information sought;[53] allegations of governmental misconduct;[54] and allegations of

49. The argument that the disclosure of executive deliberations to even one person outside the executive branch would inhibit the flow of ideas necessary to effective decisionmaking by instilling a fear of prosecution or public criticism in advisers has been accepted by federal courts in previous cases. EPA v. Mink, 410 U.S. 73 (1973); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958). *See generally* R. BERGER, *supra* note 2; F. ROURKE, *supra* note 2.

50. Reynolds v. United States, 192 F.2d 987, 997 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953). Judge Maris's views were adopted by the dissenters, Justices Black, Frankfurter and Jackson, in United States v. Reynolds, 345 U.S. 1 (1953).

51. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

52. *Id.*

53. United States v. Reynolds, 345 U.S. 1, 11 (1953); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom.* V.E.B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

54. Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964); Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich. 1965); Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D. Ill. 1965).

perversion of government power.[55] While such factors may be helpful in reaching a decision, the court's ultimate determination can be made only after considering the case in the perspective of the political system in which the judiciary functions.

The separation of powers doctrine, viewed in the realistic manner presented in *Nixon*, must be the focal point of this consideration.[56] In weighing the public and private interests involved in such cases, it is apparent that not all court-protected interests warrant an intrusion into executive privacy. Of primary concern, however, is the judiciary's role as a limiting factor in the tripartite system, as well as its dedication to its function as a forum for the resolution of conflicts. The courts must, therefore, conscientiously protect the mechanism for accomplishing these purposes. Thus, those rights that are critical to this process should outweigh the privilege in all cases except those presenting countervailing interests most critical to the preservation of the governmental system as a whole.

There is another important area which should be considered by courts applying the *Nixon* test. The Supreme Court in *Nixon* assumed that secrecy is both necessary and appropriate in the decisionmaking process.[57] Secrecy is, however, by its very nature foreign to and potentially destructive of a democracy and its practical institutions. For that reason, its use should be minimized, the indulgence in this practice being permitted only in situations in which it is absolutely essential. A consideration of this problem and an awareness of the trends toward increasing use of secrecy and its validation by the Supreme Court should be paramount in the deliberations of those applying the *Nixon* test.

Nixon establishes an additional weapon in the executive arsenal of secrecy. While the privilege recognized by the Court is not absolute, it is one which places a substantial burden upon the party seeking evidentiary materials in a criminal proceeding. Regardless of its availa-

55. United States v. Proctor & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960).

56. In contrast to the President's interpretation of the doctrine as a source of almost absolute independence among the branches, Chief Justice Burger viewed it as a limiting factor. He stated that the "separate powers were not intended to operate with absolute independence," but that each branch must depend upon the others for validation and implementation of its actions. 94 S. Ct. at 3107. For example, the Congress relies upon the Executive to carry out congressional declarations of war, a power expressly delegated to the former. Likewise, the Executive relies upon funding from Congress for the projects that the former deems important, and for confirmation of official appointments. The judiciary is instrumental in enforcing the acts of Congress and the decrees of the Executive.

57. *Id.* at 3106.

bility and validity in non-criminal proceedings or the extension of the Court's reasoning into other areas of privilege, the implications of the ruling are important when viewed in the context of the growth of executive power in the American system. In addition, serious weaknesses in the *Nixon* test pose difficult problems for those who will apply it in future cases. What is called for in response to the decision is extreme presidential circumspection in asserting the privilege, as well as continued, responsible review by the courts. Hopefully, such judicious exercise of power will prevent executive privacy from degenerating into a convenient instrument for concealing from the public what it has a right to know.

H. KING MCGLAUGHON, JR.

Constitutional Law—Lowering the Compelling State Interest Hurdle

During the twelve years since its decision in *Baker v. Carr*,[1] the Supreme Court has considered numerous challenges to state election laws raised by potential voters and candidates.[2] In ruling upon these challenges, the Court has developed an exacting standard to be applied in determining whether a state's restrictions on the right to vote violate the equal protection clause of the fourteenth amendment.[3] Because of the stringency of this standard, which requires a state to justify its restrictions by showing their necessity to further a "compelling" state interest,[4] many state laws regulating voter qualifications and candidacy

1. 369 U.S. 186 (1962). In this landmark, legislative apportionment case, the Court extended equal protection to nonracial challenges of state election statutes. Note, *Oregon v. Mitchell and the Compelling State Interest Doctrine—The End of an Era?*, 22 SYRACUSE L. REV. 1123, 1125 (1971). In so extending the equal protection clause, the Court "substantially modified the constitutional matrix in this area." 30 OHIO ST. L.J. 202 (1969).

2. *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Evans v. Cornman, 398 U.S. 419 (1970); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

3. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), in which the Court justified its imposition of this new test as follows: "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626.

4. *Id.* at 627.